

No. 4518

~~7443~~
United States

1437

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FAGEOL TRUCK, License No. 55916, Engine No.
34822, Its Tools and Appurtenances,
WHITE COMPANY, Claimant,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United
States District Court for the Northern District
of California, Third Division.

FILED

APR 8 - 1935

F. B. MONROE

United States
Circuit Court of Appeals
For the Ninth Circuit.


UNITED STATES OF AMERICA,
Appellant,

vs.

FAGEOL TRUCK, License No. 55916, Engine No.
34822, Its Tools and Appurtenances,
WHITE COMPANY, Claimant,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United
States District Court for the Northern District
of California, Third Division.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Errors.....	17
Certificate of Clerk U. S. District Court to Transcript on Appeal.....	20
Citation on Appeal.....	21
Claim of the White Company, a Corporation..	7
Decree	13
Exceptions to Libel.....	10
Libel	5
Minutes of Court—August 25, 1924—Order Sustaining Exceptions to Libel.....	13
Notice of Appeal.....	19
Order Sustaining Exceptions to Libel.....	13
Petition for Allowance of Appeal from Final Decree	15
Praeipice for Transcript.....	1
Statement of Clerk U. S. District Court.....	2



In the Southern Division of the United States District Court for the Northern District of California, Third Division.

No. —.

UNITED STATES OF AMERICA,
Appellant,

vs.

FAGEOL TRUCK, License No. 55916, Engine No. 34,822, Its Tools and Appurtenances, WHITE COMPANY, Claimant,
Respondents.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript on appeal in the above-entitled cause and transmit the same to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, and you will include in the said transcript copies of the following documents:

- (1) The libel;
- (2) The claim of claimant, White Company;
- (3) Exceptions to libel by White Company;
- (4) Order sustaining exceptions including opinion of Court, if any;
- (5) Final decree dismissing libel;
- (6) Petition for appeal including allowance thereof;
- (7) Assignments of error with the prayer for reversal.

And attach to said transcript the original citation with proof of service thereof.

STERLING CARR,
United States Attorney,
T. J. SHERIDAN,
Asst. U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Receipt of the within admitted February 20, 1925.

MELVIN, DINGLEY & STEVICK,
Attorneys for Claimant White Company.

Filed Feb. 20, 1925. Walter B. Maling, Clerk.
By C. M. Taylor, Deputy Clerk. [1*]

STATEMENT OF CLERK U. S. DISTRICT
COURT.

In the Southern Division of the United States
District Court, Northern District of California,
Third Division.

No. 18,327.

UNITED STATES OF AMERICA,
Libelant,

vs.

FAGEOL TRUCK, etc.,
Respondent.

*Page-number appearing at foot of page of original certified Transcript of Record.

PARTIES.

Libelant: United States of America.

Respondent: Fageol Truck, License No. 55,916,
Engine No. 34,822, its tools and
appurtenances.

Claimant: The White Company, a corporation.

PROCTORS.

For Libelant: STERLING CARR, Esq., United
States Attorney.

For Respondent and Claimant: MELVIN, DING-
LEY & STEVICK, San Fran-
cisco, Calif. [2]

PROCEEDINGS.

1924.

June 7. Filed libel for condemnation.

Issued monition for the attachment of
the Fageol Truck, which was after-
wards returned and filed with the
following return endorsed thereon:

“In obedience to the within Moni-
tion, I attached the property therein
described, on the 17th day of June,
1924, and have given due notice to
all persons claiming the same that
this Court will, on the 24th day of
June (if that day should be a day
of jurisdiction, if not, on the next
day of jurisdiction thereafter), pro-
ceed to the trial and condemnation

thereof, should no claim be interposed for the same.

FRED L. ESOLA,

U. S. Marshal.

By FRED S. FIELD,

Deputy Marshal.

Dated San Francisco, June 18, 1924.

I further return that I handed to and left a copy of this monition with Mr. Wobber.

Car stored at the Ambassador Garage, 1540 Pine St., S. F."

24. Proclamation duly made.

Filed monition on return.

Filed claim of The White Company, a corporation, to the Fageol Truck.

Filed exceptions to libel.

August 25. Cause came on for hearing on exceptions to libel before the Honorable Frank H. Kerrigan, Judge. After hearing the Court ordered that the exceptions be sustained and libel dismissed, and that the Fageol Truck be returned to the party from whom taken.

Filed decree.

1925.

Feb. 20. Filed notice of appeal.

Filed petition for, and order allowing, appeal.

Filed assignment of errors. [3]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. (18,327).

UNITED STATES OF AMERICA,

Libelant,

vs.

FAGEOL TRUCK, License No. 55,916, Engine
No. 34,822, Its Tools and Appurtenances,
Respondent.

LIBEL.

The United States of America by John T. Williams, United States Attorney for the Northern District of California, and Alma M. Myers, Assistant United States Attorney for said District, respectfully shows:

I.

That on or about the 5th day of June, 1924 on Half Moon Bay Road, County of San Mateo, and within the Southern Division of the Northern District of California, and within the jurisdiction of the United States and this Honorable Court, D. W. Rinckel, duly authorized, appointed and acting agent of the Internal Revenue Department of the United States, seized a certain Fageol Truck, License No. 55-916, Engine No. 34822, its tools and appurtenances, which was being operated by Leonard Brooks, in which said automobile there

was then and prior thereto, concealed and deposited certain goods, merchandise and commodities, to wit: 410 cases Scotch whiskey, the same being alcoholic distilled spirits, upon which there was then due certain tax imposed by Section 600 of the Revenue Act of 1918, as amended by Section 600 of the Revenue Act of 1921.

II.

That the said tax due and imposed, as aforesaid, had not been paid, and the said goods, merchandise and commodities were concealed, deposited and removed in said automobile with the intent to defraud the United States of the said tax. [4]

III.

That the said deposit, concealment and removal of the said goods and commodities in said automobile was and is a violation of the provisions of Section 3450 of the Revised Statutes of the United States, and the said automobile, its tools and appurtenances are subject to condemnation, forfeiture and sale.

WHEREFORE, the United States Attorney prays that the usual process issue against the said automobile, its tools and appurtenances, and that all persons interested in and concerned in the said automobile, its tools and appurtenances, be cited to appear and show cause why such forfeiture should not be adjudged, and that all due proceedings being had therein, this Honorable Court may be pleased to condemn the said automobile, its tools and appurtenances as forfeited to the United States, and that a judgment condemning the said automom-

bile, its tools and appurtenances, may thereupon be made and entered, and that the said judgment may also order the same to be sold by the United States Marshal, as provided by law, and that a writ of venditioni exponas may issue directed to the United States marshal for that purpose and for such other and further judgment and order as to the Court may seem proper in the premises.

JOHN T. WILLIAMS,
United States Attorney,
ALMA M. MYERS,
Assistant United States Attorney.

[Endorsed]: Filed Jun. 7, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[5]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Libel No. 18,327.

UNITED STATES OF AMERICA,

Libelant,

vs.

FAGEOL TRUCK, License No. 55,916, Engine
No. 34,822, Its Tools and Appurtenances,
Respondent.

CLAIM OF THE WHITE COMPANY, A CORPORATION.

Comes now The White Company, a corporation,

owner of the above-named Fageol truck, license No. 55,916, engine No. 34,822, its tools and appurtenances, by and through J. L. Sydnor, its duly authorized agent, appears before this Honorable Court and makes claim to the said Fageol truck as the same has been seized and is now held by the United States Government for an alleged violation of the Revenue Laws of the said J. L. Sydnor, as agent for the said The White Company avers that the White Company is the true and *bona fide* owner of the said truck and that no other person, persons or corporation is the owner thereof.

WHEREFORE, he prays to defend and further prays that this Court order restitution of the said Fageol truck.

J. L. SYDNOR,
District Manager.

State of California,
City and County of San Francisco,—ss.

J. L. Sydnor, being first duly sworn, deposes and says: That he is the duly authorized agent of The White Company, claimant herein; that he has read the foregoing claim and that he knows the facts therein stated to be true of his own knowledge.

[6]

And the said J. L. Sydnor further avers that the said The White Company, the owner of said Fageol truck, has sold the said truck to one George Solomon under a conditional sale contract retaining unto itself the title to the said truck until the full amount of the purchase price for the said truck

had been paid; that neither The White Company nor any of its agents had any dominion or control over or any information of the said Fageol truck at the time of the seizure of the said Fageol truck as alleged in the libel of information on file herein or at any other time between the sale of the said truck to the said George Solomon and the date of the seizure of the said truck by the United States Government; that the said The White Company did not nor did affiant know or have any cause to suspect that the said Fageol truck was at the time of the seizure of the said truck or at any other time being used in any manner contrary to law or for use in the concealment, deposit or removal of whiskey or other commodity upon which a tax is due the United States as alleged in the libel of information on file herein.

WHEREFORE, affiant prays to defend and further prays that this Court order restitution of the said Fageol truck to The White Company, the owner thereof.

J. L. SYDNOR,
Dist. Manager.

Subscribed and sworn to before me this 24th day of July, 1924.

[Seal] E. J. CASEY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jul. 24, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

In the Southern Division of the United States District Court, for the Northern District of California, Third Division.

Libel No. 18,327.

UNITED STATES OF AMERICA,

Libelant,

vs.

FAGEOL TRUCK, License No. 55,916, Engine
No. 34,822, Its Tools and Appurtenances,
Respondent.

EXCEPTIONS TO LIBEL.

The exception of the White Company, claimant of that certain Fageol truck, the respondent above named, to the libel of information of the United States of America against the said Fageol truck alleges as follows:

I.

That the said libel of information does not set out facts sufficient to constitute legal ground for this Honorable Court to condemn said Fageol truck as forfeited to the United States for violation of Section 3450 of the Revised Statutes for the reason that said Section 3450 of the Revised Statutes alleged in the said libel of information to have been violated has been in effect repealed and is no longer of any force or effect.

II.

That the said libel of information is uncertain in

this, that it is alleged in the said libel of information that there were concealed and deposited in the above-named Fageol truck four hundred and ten (410) cases of Scotch whiskey, upon which a certain tax imposed by Section 600 of the Revenue Act of 1918, as amended by Section 600 of the Revenue Act of 1921 was due and had not been paid and that the said Scotch whiskey was concealed, deposited and removed in the said Fageol truck with the intent to defraud the United States of the said tax, but it does not appear in the said libel of information nor can it be ascertained therefrom whether the tax alleged to have been [8] unpaid was for the amount of Two and 20/100 (\$2.20) Dollars on each proved gallon or for the amount of Six and 40/100 (\$6.40) Dollars on each proved gallon both of which taxes are provided for by the said act depending upon whether or not the distilled spirits are withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage.

III.

That the said libel of information is uncertain in this that it does not appear therein, nor can it be ascertained therefrom from what particular place the said Scotch whiskey was removed in the said Fageol truck or whether or not the said Scotch whiskey was removed from the place at which the said tax alleged to have been unpaid was payable.

IV.

That the said libel of information is ambiguous

and unintelligible for the reasons hereinabove set out that it is uncertain.

WHEREFORE claimant prays that the said libel of information be dismissed and this Honorable Court order restitution of the said Fageol truck to the said owner.

MELVIN, DINGLEY & STEVICK,
Proctors for Respondent and Claimant,
.314-18 Humboldt Bldg.,
San Francisco.

[Endorsed]: Filed Jul. 24, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[9]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 25th day of August in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable FRANK H. KERRIGAN, District Judge.

No. 18,327.

UNITED STATES OF AMERICA

vs.

ONE FAGEOL TRUCK, etc.

MINUTES OF COURT—AUGUST 25, 1924—
ORDER SUSTAINING EXCEPTIONS TO
LIBEL.

This matter came on regularly for hearing on exceptions to Libel. Miss Alma M. Myers, Asst. U. S. Atty., was present for and on behalf of United States. R. G. Dingley, Esq., was present as attorney for claimant. After hearing attorneys, ordered exceptions sustained without leave to amend, libel dismissed, and that the property seized in connection with this case be returned to the party or parties from whom taken, as per decree to be filed.

Page 457, Vol. 63. [10]



In the Southern Division of the United States District Court for the Northern *Division* of California, Third Division.

Libel No. 18,327.

UNITED STATES OF AMERICA,

Libelant,

vs.

FAGEOL TRUCK, License No. 55,916, Engine No.
34,822, Its Tools and Appurtenances,
Respondent.

(DECREE.)

It appearing that the exceptions of The White Company, a corporation, claimant of that certain

Fageol Truck, the respondent herein to the libel herein came on regularly for hearing this 25th day of August, 1924, before the above-entitled court, Assistant United States District Attorney Alma M. Meyers, appearing on behalf of United States of America, and Messrs. Melvin, Dingley & Stevick appearing on behalf of said The White Company, a corporation, and said exceptions having been argued on behalf of all the parties hereto and the Court having been advised in the premises and it appearing that said The White Company, a corporation, is the true and *bona fide* owner of said automobile truck, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the said exceptions of The White Company, a corporation, to the libel herein, be and the same are hereby sustained without leave to amend, and said libel is hereby dismissed, and

IT IS FURTHER ORDERED that that certain Fageol Truck License No. 55,916, Engine No. 34,822, heretofore held by virtue of the proceedings herein, be returned and the possession thereof given to The White Company, a corporation, claimant herein or to [11] Messrs. Melvin, Dingley & Stevick, its attorneys, and you, Samuel Rutter, Prohibition Director, or your proper deputy holding the said automobile truck, are hereby directed to immediately deliver the same to the person or persons in this order designated.

Dated August 25th, 1924.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Aug. 25, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. Entered in Vol. 17 Judg. and Decrees, at page 312. [12]

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

No. 18,327.

UNITED STATES OF AMERICA,

Appellant,

vs.

FAGEOL TRUCK, License No. 55,916, Engine No. 34,822, Its Tools and Appurtenances.
WHITE COMPANY, Claimant,

Respondents.

PETITION FOR ALLOWANCE OF APPEAL
FROM FINAL DECREE.

To the Honorable, the Judges of the United States District Court for the Northern District of California:

The United States of America, appellant in the above-entitled proceeding, feeling aggrieved by the final decree made and entered therein against it on August 25, 1924, dismissing its libel theretofore filed, hereby appeals from said final decree to the United States Circuit Court of Appeals for the Ninth Circuit, upon the reasons set forth in the assignment of errors filed herewith, and it prays

that the said appeal be allowed, that a citation be issued as provided by law and that transcript of records, proceedings and papers upon which the said decree was based duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in such cases made and provided. [13]

And your petitioner further shows that since the United States of America is appellant herein and this appeal is taken at the direction of the Department of Justice, that no bond or other security should be required but that this appeal be allowed, without such bond.

STERLING CARR,
United States Attorney,
T. J. SHERIDAN,
Asst. U. S. Attorney,
Attorneys for Appellant.

The appeal prayed for in the foregoing petition is hereby allowed, and it is further ORDERED that no bond or other security be required from appellant.

Dated: February 19, 1925.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Feb. 20, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[14]

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

(No. 18,327.)

UNITED STATES OF AMERICA,

Appellant,

vs.

FAGEOL TRUCK, License No. 55,916, Engine No. 34,822, Its Tools and Appurtenances,
WHITE COMPANY, Claimant,

Respondents.

ASSIGNMENT OF ERRORS.

Now comes the plaintiff, The United States of America, the libelant in the above-entitled cause, being the appellant herein, and makes the following assignments of error, which said libelant and appellant respectfully avers to have occurred in the proceedings, decree and judgment of this cause in the District Court, to wit:

I.

That the Court erred in sustaining the exceptions of claimant to the libel filed by appellant.

II.

The Court erred in sustaining exceptions to libel without leave to amend.

III.

The Court erred in its order dismissing the said libel on sustaining exceptions thereto. [15]

IV.

The Court erred in its order directing the automobile referred to in said libel to be returned to claimant.

V.

The Court erred in holding upon consideration of the exceptions to the libel that the said libel was not sufficient in law to state a cause of action for the condemnation of the automobile therein referred to and in holding that such proceedings by libel for condemnation would not lie against automobiles transporting intoxicating liquors.

VI.

The Court erred in holding and deciding that libelant's said libel was not maintainable under Section 3450 of the Revised Statutes.

VII.

The Court erred in giving and entering its said decree dismissing the said libel upon its consideration of the said libel and the exceptions thereto.

WHEREFORE said appellant prays that the said decree be reversed and that the said case be remanded for further proceedings upon the said libel.

STERLING CARR,

United States Attorney,

T. J. SHERIDAN,

Asst. U. S. Attorney,

Attorneys for Libelant and Appellant.

[Endorsed]: Filed Feb. 20, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

No. (18,327.)

UNITED STATES OF AMERICA,

Appellant,

vs.

FAGEOL TRUCK, License No. 55,916, Engine No. 34,822, Its Tools and Appurtenances,
WHITE COMPANY, Claimant,
Respondents.

(NOTICE OF APPEAL.)

To the Claimant Above Named, the White Company, and to Melvin, Dingley & Stevick, Its Attorneys:

Take notice that the United States of America, libelant in the above-entitled proceeding, appeals to the Circuit Court of Appeals in and for the Ninth Circuit from that certain order and decree of the above-entitled court made and entered in the above-entitled proceeding on August 25, 1924, dismissing the libel and from the whole of said decree.

Dated: February 19, 1925.

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Libelant and Appellant.

[Endorsed]: Filed Feb. 20, 1925. Walter B. Maling Clerk. By C. M. Taylor, Deputy Clerk. [17]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 17 pages, numbered from 1 to 17, inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of United States of America vs. Fageol Truck, etc., No. 18,327, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the præcipe for transcript on appeal (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of six dollars and twenty cents (\$6.20), and that the same will be charged against the United States in my next quarterly account.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of March, A. D. 1925.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [18]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to White Company, Claimant, and Melvin, Dingley & Stevick, Attorneys for Claimant in that Certain Proceeding entitled United States of America, Appellant, vs. Fageol Truck, License No. 55,916, Engine No. 34,822, Its Tools and Appurtenances, Libel No. 18,327, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein United States of America is an appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 19th day of February, A. D. 1925.

FRANK H. KERRIGAN,
United States District Judge. [19]

Receipt of copy of the within citation admitted
February 20, 1925.

MELVIN, DINGLEY & STEVICK,
Attorneys for Claimant, White Company.

[Endorsed]: No. 18,327. United States District
Court for the Northern District of California
United States of America, Appellant, vs. Fageol
Truck, License No. 55,916, Engine No. 34,822, Its
Tools and Appurtenances, White Company, Claim-
ant, Respondents. Citation on Appeal. Filed
Feb. 20, 1925. Walter B. Maling, Clerk. By C. M.
Taylor, Deputy Clerk.

[Endorsed]: No. 4518. United States Circuit
Court of Appeals for the Ninth Circuit. United
States of America, Appellant, vs. Fageol Truck,
License No. 55,916, Engine No. 34,822, Its Tools
and Appurtenances, White Company, Claimant, Ap-
pellee. Transcript of Record. Upon Appeal from
the Southern Division of the United States District
Court for the Northern District of California,
Third Division.

Filed March 5, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.